

BEFORE THE DEPARTMENT OF ENVIRONMENTAL QUALITY
OF THE STATE OF MONTANA

In the matter of the amendment of ARM)	NOTICE OF AMENDMENT AND
17.56.502, 17.56.507, 17.56.604,)	ADOPTION
17.56.607, and 17.56.608, and the)	
adoption of New Rule I pertaining to)	(UNDERGROUND STORAGE
reporting and numbering petroleum)	TANKS)
releases)	

TO: All Concerned Persons

1. On November 8, 2007, the Department of Environmental Quality published MAR Notice No. 17-264 regarding a notice of public hearing on the proposed amendment and adoption of the above-stated rules at page 1743, 2007 Montana Administrative Register, issue number 21.

2. The department has amended ARM 17.56.502, 17.56.507, 17.56.604, 17.56.607, and 17.56.608, and adopted New Rule I (17.56.508) exactly as proposed.

3. The following comments were received and appear with the department's responses:

COMMENT NO. 1: The department received a comment that the term "substantial evidence," as it is used in proposed New Rule I, requires further definition or explanation. The commentor further expressed concern that the term "substantial evidence" may be subjective, and requested further explanation from the department as to how the term will be applied by the department in the context of implementing New Rule I.

RESPONSE: In proposed New Rule I (Numbering Petroleum Releases) the term "substantial evidence" is used in (2) which sets forth the circumstances under which a separate release will be confirmed and assigned a release number, and in (5) which sets forth the circumstances under which the department may rescind a release number. Under (2), the department shall confirm a separate release and assign another release identification number to petroleum contamination from a petroleum storage tank at a facility that has a previously confirmed and numbered release: (a) when a separate release from a petroleum storage tank is discovered at a facility and, based on substantial evidence, the department finds the release began after the department categorized all earlier confirmed releases at the facility as resolved in accordance with ARM 17.56.607(4); (b) when, based on substantial evidence, the department finds that there is a separate release of petroleum from a petroleum storage tank at a facility that began after any previously confirmed and numbered release was discovered; or (c) when additional contamination from a petroleum storage tank is discovered and, based on substantial evidence, the department finds that the contamination originated from a petroleum storage tank or tanks at a different facility than the facility where the previously confirmed and

numbered release occurred. Under (5) the department may rescind a release number if the department determines that the release should not have been confirmed. Rescission of a release number must be based on substantial evidence upon which the department may conclude that the release did not occur, that the contamination did not exceed standards cited in ARM 17.56.506, or that the contamination does not meet the criteria set forth in (2) and should have been attributed to an earlier confirmed release that has been assigned a release number.

In the context of New Rule I, the department intends that conclusions under (2) or (5) be supported by relevant evidence that is sufficient to support the department's findings of fact and application of the rule. Section 2-4-704, MCA, sets forth standards of judicial review of contested cases under the Montana Administrative Procedure Act. A court may reverse an agency decision where the decision is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. See 2-4-704(2)(a)(v), MCA. The Montana Supreme Court has considered the meaning of "substantial evidence" and held that substantial evidence is more than a mere scintilla, but may be somewhat less than a preponderance of evidence to support an agency's findings of fact. Matter of the Wage Claim of Marilyn Ramsay v. Yellowstone Neurosurgical Associates, P.C., 329 Mont 489, 495, 125 P.3d 1091, 1095 (Dec. 13, 2005). The department will adhere to the Montana Supreme Court's definition of "substantial evidence."

Reviewed by:

DEPARTMENT OF ENVIRONMENTAL
QUALITY

/s/ James M. Madden
JAMES M. MADDEN
Rule Reviewer

By: /s/ Richard H. Oppen
RICHARD H. OPPER, DIRECTOR

Certified to the Secretary of State, December 10, 2007.